

Exhibit "A"

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action

No. 00-11671-WGY

* * * * *

RICHARD W. COMERFORD,

Plaintiff,

v.

THE UNITED STATES DEPARTMENT OF
DEFENSE and COMMONWEALTH OF
MASSACHUSETTS, et al.,

Defendants.

* * * * *

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

RICHARD W. COMERFORD, Pro Se, 9 Speedwell Lane,
Plymouth, Massachusetts 02360

BARBARA HEALY SMITH, Assistant United States
Attorney, 1 Courthouse Way, Suite 9200, Boston,
Massachusetts 02210, on behalf of the Federal
Defendants

OFFICE OF THE MASSACHUSETTS ATTORNEY GENERAL (By
Michelle A. Kaczynski, Assistant Attorney General),
Trial Division, 200 Portland Street, Boston,
Massachusetts 02114, on behalf of the Commonwealth of
Massachusetts Defendants

1 Courthouse Way
Boston, Massachusetts

October 30, 2001

A P P E A R A N C E S (Cont'd)

SHADAWRY & RABINOVITZ (By Edward Rabinovitz,
Esq.), 15 Broad Street, Boston, Massachusetts 02109, on
behalf of David Smith and Rhonda Smith

LAW OFFICE OF TIMOTHY M. BURKE (By Joseph P.
Kittridge, Esq.), 160 Gould Street, Suite 111, Needham,
Massachusetts 02494-2300, on behalf of James M.
Deyermund

1 THE CLERK: All rise. Court is in session, please
2 be seated.

3 Calling Civil Action No. 00-11671, Comerford v.
4 the United States, et al.

5 THE COURT: Good afternoon. Would the parties
6 identify themselves.

7 MR. COMERFORD: Richard Comerford for himself,
8 your Honor.

9 MS. SMITH: Barbara Healy Smith, Assistant U.S.
10 Attorney for the federal defendants.

11 MR. RABINOVITZ: Edward Rabinovitz representing
12 the private defendants, David and Rhonda Smith.

13 MR. KITTRIDGE: Joseph Kittridge for defendant
14 Deyermond.

15 MS. KACZYNSKI: Michelle Kaczynski, Assistant
16 Attorney General for the defendants Mass. Army National
17 Guard, Commonwealth of Massachusetts, and Colonel Vezina.

18 THE COURT: All right. Mr. Comerford, when do you
19 want to go to trial in this case?

20 MR. COMERFORD: As soon as possible, your Honor.

21 THE COURT: Well, let's talk about that. I have a
22 medical malpractice case on that is due to go to the jury
23 on the 19th of November. That's the week of Thanksgiving.

24 When is the federal administrative proceedings
25 supposed to come to an end, Ms. Smith?

1 MS. SMITH: As I understand it, your Honor, any
2 time between now and December 20th.

3 THE COURT: Oh, we're up to December 20 now?

4 MS. SMITH: That's I believe what -- is that the
5 date I put in the status?

6 THE COURT: Well, you may well have.

7 MR. RABINOVITZ: Yes.

8 MS. SMITH: I just -- yes.

9 THE COURT: Well, I'm not waiting on it.

10 MS. SMITH: If I may, your Honor?

11 THE COURT: Well, I'm not waiting on it.

12 MS. SMITH: I understand.

13 THE COURT: I've already waited until
14 October 15th. Now, I did that for a perfectly intelligible
15 reason. There's ample time for the agency to pull itself
16 together and take a position.

17 Now, if they take a position then I'm going to
18 treat this as a hearing on an administrative agency
19 decision. If I get to it before then I'll decide the
20 matter and they'll be bound. But I'm not rushing it. I
21 have matters to deal with.

22 Now, I'm going to impanel on the 26th of November
23 a two day criminal case, and maybe a civil case as well.

24 What's next after, after that? What's the next
25 case?

1 (Whereupon the Court and the Clerk conferred.)

2 THE COURT: All right, here's what I'm disposed to
3 do. I will hold this -- I have four civil cases for
4 November. One I'm going to hold a pretrial conference on
5 now.

6 This will be the fifth. And I'll try them in that
7 order. That way I am both, in my eyes, fair to Mr.
8 Comerford, because I put the case right back in order to be
9 tried, in November, and fair to the defense because I
10 haven't jumped Mr. Comerford's case over any other cases
11 that I have.

12 Now, if those cases all settle and resolve, I'll
13 come looking for you. The likelihood is I will not come
14 looking for you before late November. But any case can
15 settle. But I don't think we'll run through the case I
16 have on trial now plus four other cases by November. So it
17 will probably be sometime in December.

18 Now, if that's when we're going to go to trial,
19 still sticking with Mr. Comerford, what matters need to be
20 resolved now?

21 This is a jury waived trial. You don't get a jury
22 on this. At least I don't see any claims that are
23 cognizable to a jury.

24 Let me ask the defense that. There are no such
25 claims, are there?

1 MS. SMITH: It's the federal defendants' view that
2 none of these claims are justiciable in this Court, your
3 Honor.

4 THE COURT: Well, you take --

5 MS. SMITH: Briefing on that was put off at the
6 time we stayed the prior proceedings.

7 THE COURT: The case is alive now. You go ahead
8 and attack it. But we're going to start with a trial date
9 and work back. If you're right, if you're right, I, of
10 course, will follow the law. Mr. Comerford will get his
11 chance to oppose it. But assuming something is
12 justiciable, nothing's before a jury?

13 MS. SMITH: Nothing.

14 THE COURT: That's my view. All right. So it's
15 going to be a jury waived case before me, Mr. Comerford.
16 What -- I've now set the trial date. The case is open,
17 it's alive. What more should I do this afternoon?

18 MR. COMERFORD: Your Honor, could you give me
19 guidance on discovery?

20 THE COURT: Well, I really can't give you guidance
21 but I'm not hesitant. I mean, you understand I'm not your
22 lawyer here.

23 MR. COMERFORD: Yes, sir.

24 THE COURT: But I now have a live case. You
25 characterize this case considerably different than the

1 defendants. At least than the defendant Department of the
2 Army. They say that all of this is an administrative, all
3 of this is an administrative hearing and the Court should
4 keep their nose out of it. And if I have any review at
5 all, I have a very narrow review. And despite the fact I'm
6 trying to get the matter resolved, they say I've got to
7 wait on them. And what's more, even when they've resolved
8 it probably I have nothing to do.

9 She may say some other things and she may say it
10 better than that, but she thinks there will never be a
11 trial here.

12 Now, conceivably she may be right. But I've
13 waited long enough. It's now time to face up to issues and
14 for me to take a position on them.

15 And I answer your question by making that
16 statement. Because I'm starting out now treating this case
17 like any other case. But I'm giving it a prompt trial. It
18 will be the fifth case in order, civil, once I work through
19 these other four civil cases after the case I have on trial
20 now. So that's November or December, your case will be
21 adjudicated.

22 In that time you may want to ask for some
23 discovery. My guess is that as soon as you ask for it they
24 will oppose it. They will say no discovery, no examination
25 of the merits is permitted at all, at least probably the

1 MR. COMERFORD: Thank you.

2 THE COURT: You've made that clear. And I think I
3 have cautioned you as to the risks of being represented by
4 counsel. But if I haven't let me.

5 MR. COMERFORD: Yes, sir.

6 MS. SMITH: There is counsel of record.

7 THE COURT: Wait. Well, fine.

8 MS. SMITH: In one of the cases.

9 THE COURT: Fine. That counsel -- the man tells
10 me he's not authorized to act. Every action has got to be
11 dealt with Mr. Comerford. Only with Mr. Comerford. It's
12 clear to me he wants to act on his own behalf.

13 But I must caution you. Just as I said I can't be
14 your lawyer, I can't cut you any slack. When a person
15 rep -- first, you've got every right to represent yourself.
16 You have a right to come into court insofar as anyone so
17 situated as you has a right. The government's going to say
18 throw him out of court on the legalities of it, and we'll
19 see. But you have a right to be here. You have a right to
20 be treated courteously and to be given every accommodation
21 that I give to attorneys. But no more. I'm supposed to
22 take into account that you don't really have a lawyer with
23 you, but that doesn't translate into my making arguments
24 that you should have made or anything like that.

25 I'm not your lawyer. I do counsel you, and I do

1 Department of the Army will say that, because they say you
2 just don't have any business here. I don't know what the
3 other defendants will say, but they may well say the same
4 or some variation of that. If that happens I'll have to
5 decide that, or at least decide it preliminarily.

6 I'm sorry I can't give you any more guidance. But
7 to me I always am very straightforward, I try to be. I put
8 this case on ice, and while I didn't forget, I put it on
9 ice until the 15th of October. You filed various motions.
10 I just filed them. The case is on ice. I didn't deal with
11 them other than to file them.

12 Well, the 15th of October has come and gone,
13 you've asked for the case to be rendered alive. Well, I
14 am. And it's never going to be closed again. We're going
15 to resolve the case. But the truth is I haven't thought
16 through these issues.

17 (Whereupon the Court and the Clerk conferred.)

18 THE COURT: Ms. Smith reminds me there's of course
19 two cases, because we've consolidated the two cases into
20 one case. But I'm talking generally. That's the most
21 guidance I can give you.

22 Anything else?

23 MR. COMERFORD: Yes, sir. The federal and
24 Commonwealth attorneys claim I am represented by counsel.

25 THE COURT: You can represent yourself.

1 it most sincerely, most people have lawyers in court.
2 That's why there is a legal profession because things are
3 technical.

4 Do you -- are you going to get a lawyer in this
5 case?

6 MR. COMERFORD: Your Honor, I am not representing
7 myself out of arrogance. The last month the government
8 paid me for was April '96. I have endured investigation
9 after investigation.

10 THE COURT: But my question now. Understand my
11 question.

12 MR. COMERFORD: Yes, sir. Sorry.

13 THE COURT: Are you going to get a lawyer?

14 MR. COMERFORD: No, I do not think so, sir.

15 THE COURT: All right. I've cautioned you and you
16 have made it very clear that for now you're representing
17 yourself in both cases. If you get a lawyer and the lawyer
18 files an appearance then I'll deal only with the lawyer.
19 But for now everyone knows you're representing yourself,
20 they'll all deal directly with you.

21 All right. Anything else that I need to deal
22 with? We'll hear what they have to say now.

23 All right. Now, that's how I intend to proceed.
24 Ms. Smith?

25 MS. SMITH: Your Honor, for the record, I feel I

1 need to say that the ABCMR, which is not a party to the
2 suit, is the administrative body, the Army Board for
3 Correction of Military Records which is reviewing Mr.
4 Comerford's petition. They have received additional
5 materials and requests for relief and evidence as recently
6 as, as I understand it, August and September from Mr.
7 Comerford. That is, all of that needs to go into the
8 hopper to be considered.

9 As I also understand it, and this may speed
10 things, they don't have a current physical and
11 psychological exam and all of the claims have to do with
12 medical disability or being fit for duty. And as I
13 understand, I may be wrong, but Major Comerford has refused
14 the Army's request that he get such an exam. If they had
15 one it makes it a little easier to consider what the
16 options are and what some of the claims are.

17 THE COURT: Well, you talk to him but I'm not --
18 are you moving for a physical exam under the Rules of Civil
19 procedure?

20 MS. SMITH: Well, I would need to check whether,
21 the relevance to this case, although I suspect the claims
22 are relevant, your Honor, in order to do that. So I'm
23 stopping short of that today.

24 THE COURT: Yes. Then you make a motion and I'll,
25 it's a discovery motion, and I'll deal with it as a normal

1 discovery motion.

2 MS. SMITH: The other point I need to make is that
3 we did stay this at a fairly early stage so that things
4 would not be prematurely split apart. There are Tucker Act
5 claims here in our view. There are claims barred by the
6 fairness doctrine in our view. That briefing has been
7 stayed. I anticipate we will be filing that brief
8 posthaste because -- I mean, the tort claims cannot be
9 brought. They're incident to military service.

10 THE COURT: Well, I hear you and I've cautioned
11 Mr. Comerford. But those things were all in the offing
12 when I stayed the action. And I stayed it for a finite
13 period. Now the stay has run out. Now it's time to face
14 up. If he's to be, figuratively, thrown out of court or
15 transferred to another court, or I have to say that I
16 don't, primary jurisdiction is an administrative agency,
17 those are all things I have to say on the record with a
18 decision. None of them have I faced up to.

19 Contrariwise, if he were to survive those things
20 I've now set a trial date, or I've set it in order to be
21 tried, and when that comes up, assuming I have something to
22 try, I'm going to try it. All right.

23 MS. SMITH: Just so I can be clear, whatever
24 discovery's going to be done for trial, because none of it
25 was done prior to closure, whatever briefing, dispositive

1 briefing will be done and whatever trial prep, will all be
2 done between now and November 1st?

3 THE COURT: I didn't say November 1st.

4 MS. SMITH: But are we on the November list?

5 THE COURT: What?

6 MS. SMITH: On the November list?

7 THE COURT: You're on the November list. And
8 you're the fifth case on the November list and it looks
9 like I won't get to you until December.

10 MS. SMITH: Unless the first four settle.

11 THE COURT: Well, even if they don't settle we'll
12 try them. We'll be to you probably sometime in December.
13 And then I'm going to trial.

14 Now, in the meantime if you make motions, I'll
15 deal with the motions.

16 MS. SMITH: Thank you, your Honor.

17 THE COURT: All right. Anyone else have any
18 question? Any questions? Yes?

19 MS. KACZYNSKI: Just to advise your Honor that I
20 am scheduled to be before the Appeals Court of the
21 Commonwealth on Monday, November 19th.

22 THE COURT: My, my usual -- thank you. And my
23 usual rules apply. I will, if we get this case to trial, I
24 will honor your other trial, actual trial engagements and
25 that's a type of engagement I would honor. So we wouldn't

1 try it that day because you're engaged before another
2 court.

3 Any other questions?

4 MR. KITTRIDGE: Yes, your Honor. Attorney Joseph
5 Kittridge on behalf of State Police Officer James
6 Deyermond.

7 His role in this is a lot different than having to
8 do with any administrative entitlement to any benefits or
9 anything. There's the allegation that he conducted an
10 investigation, in some way conspired with the other
11 defendants and participated in the deprivation of these
12 benefits. As a result of the stay none of the discovery
13 had been conducted by my client. I feel with such a short
14 window my client is being prejudiced by not having the
15 opportunity to do some more discovery before a potential
16 trial in 30 days.

17 THE COURT: Well, I'd get to it. The simple fact
18 of the recitation of the schedule, that doesn't prejudice
19 your client and we'll see when we get close to trial. You
20 get to the discovery.

21 I hear no other questions. All right.

22 There are various motions for preliminary relief
23 on the part of Mr. Comerford. Those are denied. And the
24 case is set for trial, and if there's motion practice
25 either as to discovery or dispositive motions I'll deal

1 with it promptly.

2 Thank you very much. The other matter is a
3 pretrial conference and we'll deal with that in the lobby.
4 We'll recess.

5 THE CLERK: All rise.

6 (Whereupon the matter concluded.)

7

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF MASSACHUSETTS

10

11 I, Donald E. Womack, do hereby certify that the
12 above proceedings were reported by me stenographically and
13 this transcript represents a true and accurate
14 transcription of said proceedings.

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